

**TESTIMONY OF MICHAEL HOROWITZ
SENIOR FELLOW, HUDSON INSTITUTE**

**BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
OF THE
HOUSE COMMITTEE ON GOVERNMENT REFORM AND
OVERSIGHT**

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Mr. Chairman and Members of the Committee: I am grateful for the opportunity to appear before you this morning to testify about the Federalism Executive Order, E.O. 13083, issued by President Clinton on May 14, 1998. Specifically, Executive Order 13083 revoked Executive Order 12612, a 1987 Reagan Administration policy document that was the product of intense discussion and collaboration between Federal officials and representatives of State and local governments. Critically, the Reagan Executive Order was a synthesizing, culminating expression of one of the most deeply held visions of President Reagan, and one of his principal domestic policy legacies.

It is highly fitting that this Committee should be addressing the Clinton Administration's revocation of Executive Order 12612, for the issue of Federalism is one that calls the highest degree of Congressional scrutiny and oversight.

I am in a position to offer to the Committee some of the background history that led to the now-revoked Reagan Executive Order. This is so because even though the Order was issued after I left the Reagan Administration, I had earlier served it, while General Counsel of the Office of Management and Budget, as the first Chairman of the Reagan Administration's Cabinet Council on Federalism. (I was succeeded in that job by Charles Cooper, Assistant Attorney General for the Office of Legal Counsel, whose Deputy, Eugene Hickock, appears with me on this panel.)

The Working Group received unambiguous marching orders from the President:

- Few matters are as important to the country's health and well-being and the American constitutional order as the need to strike an appropriate balance between the powers and duties of the Federal government and those of State and local governments; striking such a balance requires a strong preemption against Federal presumption of the laws and policies of State and local governments.
- The need to preserve State and local decision-making authority is greatest when dealing with Federal regulations and the unelected agency officials who write and administer them; nothing more undermines the vitality and independence of State and local government, and its ability to act in democratically accountable fashion, than for State and local officials to become subordinate middle managers who take their orders from Federal agency officials.
- No decisions regarding issues of Federalism are to be made without full discussion, consultation and collaboration with representatives of State and local governments; decisions regarding important issues of Federalism policy are to be made by the President, no one else.

I believe that few things were closer to President Reagan's heart or to the legacy he wished to create than to make State and local governments genuine partners of and not subordinate supplicants to the Federal government. I know that few things angered him as much as when there was a lack of respect or deference shown by Federal agency officials to the knowledge, experience or authority of State and local officials.

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The Chairman's letter to the President of June 8 sets out a powerful critique of Executive Order 13083 which I fully share and will not rehearse. I believe that my testimony can be of greatest value to the Committee by describing how Federalism matters were dealt with in the Reagan Administration, and by using that experience to evaluate the effect of the Clinton Administration's Executive Order.

The Reagan Administration's Decision-Making Process: As indicated, issues of Federalism were assigned a high and personal priority by President Reagan, and decisions on those issues were at all times required to be made only after full consultation and collaboration with State and local officials. Thus, reports that Executive Order 13083 was largely handled by mid-level OMB staff officials *and that* it was issued without meaningful input from State and local officials raise issues as important as the Executive Order itself. I can tell the Committee that my head would have rolled in the Reagan Administration – *rolled* – had I drafted an Executive Order on Federalism and sent it on for the President's pro forma signature without having consulted at great length with a broad range of State and local officials and organizations. For that reason, I very much hope that the Committee will explore the *process* by which Executive Order 13083 was issued – and will thereby examine the full record of the Clinton Administration on the issue of Federalism. Because Presidents are compelled to examine and approve many documents, it may be hard to criticize President Clinton personally for having signed his name to an Executive Order that was written in dense legalese. On the other hand, the fact that Executive Order 13083 could have been so routinely and cavalierly processed by mid-level Clinton Administration officials *does* tell much about the low priority that President Clinton himself has assigned to the issue of Federalism. It tells much about the signals he has almost certainly sent (and not sent) to officials of his Administration about the need to respect State and local officials and to defer to their authority whenever possible. Executive Order 13083 is so indefensible, so happily under attack by both Democrats and Republicans, so clearly subject to the scrutiny of this Committee that it would be surprising in the extreme were it not withdrawn. What the Order directs attention to, however, and what will not be cured without the active and ongoing attention of this Committee, is the Clinton Administration's overall Federalism record. I believe that the President himself can and must be strongly taken to account for having created an environment of indifference and hostility to Federalism that clearly gave mid-level Administration officials a sense of freedom to routinely move Executive Order 13083 through the decision-making process. I therefore respectfully urge the Committee to not to treat the Executive Order 13083 debacle as an end itself but rather as a signal of the need to examine the Clinton's Administration's overall record on the issue of Federalism.

The Reagan Administration's Substantive Record: As Executive Order 13083 is little short of a rejection of President Reagan's basic approach to Federal-State-local relations, it may be in order to examine a representative few of the Reagan Administration's actual decisions and initiatives on the subject.

Executive Order 12372, issued before the Reagan Executive Order whose revocation is the subject of today's hearing, was a characteristic expression of President Reagan's approach. Reforming an OMB Circular that had created a formalistic, bureaucratic, paper-heavy and easy to ignore "Clearing House" mechanism for resolving Federal-State disputes over Federal grants and expenditures, Executive Order 12372 deliberately gave State officials greater stature and visibility than the Federal officials whose decisions they critiqued. Under the Executive Order, decision-making leverage was also reversed, for Federal officials were flatly directed to "accommodate to" a single, designated "Point of Contact" official or to "explain, in writing" why they could not do so. Executive Order 12372, which gave State and local officials a timely, meaningful and generally determinative say on decisions regarding Federal aid and direct development, stands in direct contrast to the Clinton Administration's Executive Order 13083.

A series of Block Grant proposals were among the first legislative initiatives of the Reagan Administration. Under that initiative, President Reagan sought to merge a large number of Federal categorical grant programs into a small number of block grants *and* to radically increase State authority over how to spend the grant money. Opposition to the block grant proposals was intense, but President Reagan prevailed and, in August, 1981, 57 categorical grant programs were consolidated into nine block grants. As a result, the number of Federal staff officials administering the former categorical programs were reduced from 3,000 to about 600. Paperwork and administrative burdens on State and local officials were reduced even more radically – by over 5.9 million hours per year. This was accomplished by reducing Federal regulatory overreach in a determinedly radical fashion – so that the number of Federal Register pages covering the former categorical programs was reduced from 905 pages to 31 pages. Under the block grants, State and local governments almost never needed to ask permission, clearance or waivers from Federal officials to act as they deemed best; their principal responsibility was to report, after the fact, on what they had done. In addition, indeed *because* the Reagan block grant initiative honored

Federalism principles, significant dollar savings were achieved. Thus, even though Federal support for the block grants was reduced by 25% from levels previously appropriated for the categorical programs, the General Accounting Office reported that services had not been diminished to any degree. The Reagan block grant initiative was extended the following year with the Joint Training Partnership Act, in which States were again given far greater authority over the program area, thanks to further, radical reduction of the previously great powers held by Federal agency officials. This was what the Reagan Federalism revolution was all about: converting State and local officials from dependent supplicants and bureaucratic paper pushers to real-world policymakers, and in a manner that, at lower cost, strengthened the popularity and success of the once Washington-based programs.

The “Grand Swap” and “Turnback” initiatives of the Reagan Administration reflected a culminating effort by President Reagan to achieve a Federalism revolution. Under that proposal, set forth in the FY 1983 Reagan budget, revenue sources such as Federal telephone and highway taxes were proposed to be turned back to the States, who were then given full authority over Federal highway and other construction programs. In addition, and even more radically, President Reagan proposed that the Federal government assume 100% of the costs of Medicaid in exchange for State assumption of full responsibility and authority for Food Stamps, AFDC and related welfare programs. The initiative failed because of a monumental miscalculation on the part of the National Governors Association, which failed to accept President Reagan’s wholly accurate assertion that the built-in expansionary potential of Medicaid was greater than that of welfare programs, and by orders of magnitude. It reflected a Reagan Administration “grand design” on Federalism that stands in sad contrast to the subject of today’s hearing.

In all, a study conducted of President Reagan’s Federal reforms by Richard Nathan and Fred Doolittle of the Woodrow Wilson School of Princeton University concluded that his reforms were “structural” in character, literally revolutionary and highly successful. Nathan and Doolittle described President Reagan’s Federalism initiatives as great “sleepers” reforms and believed that, unless later reversed, they would become major legacies of his Administration.

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Based on my experience in dealing with Federalism questions at the White House, I believe that there are two particular respects in which President Clinton's revocation of the Reagan Federalism Executive Order raise grave danger signals. They are:

- the Clinton Administration's apparent commitment to using its waiver authority as a preferred means of resolving Federal-State-local issues; and
- the ease with which State and local officials can lapse into a supplicating, dependent relationship with the Federal government and its regulatory officials.

Waiver-Based, "Let's-Make-a-Deal" Government: As the Committee is aware, President Clinton's Executive Order 13083 not only revoked President Reagan's Executive Order 12162, but also revoked the earlier Clinton Administration Executive Order 12875, which had ratified and supplemented the Reagan Order. Executive Order 12875 contained a particularly useful feature -- a section that enhanced the flexibility of the Federal waiver process. In the context of its endorsement of the Reagan presumption that major Federalism disputes were to be resolved against the exercise of Federal authority, Executive Order 12875's enhanced waiver processes represented net enhancements of State and local powers.

Tellingly, while Executive Order 13083 revoked many of the provisions and presumptions of the Clinton Administration's first Federalism Executive Order, it retained the latter's waiver provisions. In the context of the Executive Order's reversal of the Reagan Federalism presumptions in favor of State and local autonomy, its retention of the section dealing with enhanced waiver processes takes on a wholly different cast. Under Executive Order 13083, an enhanced waiver process is not to be seen as a supplement to other broad powers given to State and local governments vis a vis the Federal government. Rather, it becomes a (if not the) prime means by which Federalism questions are to be resolved from now on. As such, it is difficult to imagine a decision-making process less structural, more ad hoc, more open to day-by-day politics, more consistent with the vision of the Federal government as parent and State and local governments as children than the decision-by-waiver regime contemplated

by Executive Order 13083. Such a case-by-case “let’s-make-a-deal” regime was precisely what all Reagan actions and Executive Orders on Federalism sought to do away with. As earlier noted, I hope that this Committee will take steps to ensure not only the revocation of Executive Order 13083, but that it will take on and negate the centralizing, Washington-knows-best mindset that produced it.

Unaccountable, “Blame Washington” Conduct by State and Local Officials: Perhaps the greatest contribution I can offer this Committee comes from my experience as the Federal point person who was charged with reducing Federal regulatory control over the categorical programs placed in the Reagan Block Grants. While, as noted, we ultimately succeeded in reducing the number of Federal Register pages for those programs from 905 to 31, the howls, threats, screams and cries of anguish that accompanied that outcome were great – as I had expected.

But here’s the surprise: The loudest protests against reducing the Federal regulatory role often came from State and local officials. Those officials had become comfortable with being passive supplicants to Federal agency officials, had used their powerlessness to immunize themselves from blame when the programs they administered were operating inefficiently or failed to achieve their stated objectives.

Thinking as I did that State and local officials would welcome the enhanced authority that the Reagan Administration had sought to give them, and thinking that they would be our allies in struggles against entrenched Federal bureaucracies that had long managed the Federal categorical programs, I was stunned to discover that the reverse was often the case. The fact was that many (but, thank goodness, not all) State and local officials had grown comfortable with doing little but coming to Washington to demand higher appropriations for categorical programs- a process that made them agents and allies of the Federal bureaucracies that regulated them.

From that experience, I came to recognize that a healthy Federalism is fragile in character. I came to see that many State and local officials had to be affirmatively compelled to take responsibility for the programs they ostensibly administered, had to be compelled to act as policymakers. I came to see that the accountability which accompanies authority was frightening to many State and local officials, who took personal and political profit from the anonymity, shorter hours and dependency that went with Federal control.

That the issuance of Executive Order 13083 has met with such outrage from State and local officials is healthy – in many ways a testament to the still-continuing effects of the Reagan Federalism revolution. But Members of this Committee need to realize that this reaction is not innate. Based on my experience, I believe that matters can easily return to the days of an all-controlling Federal government – with the support of State and local officials. A critical means of ensuring a genuine partnership in governance between Federal, State and local officials is vigilance of Congress and the press like that being exercised today.

It is for such reasons that I take such pleasure in this Committee's leadership. Knowing as I do that the bureaucratic impulse can be comfortable to many State and local officials, I believe it vital for there to be constant Congressional oversight in support of a healthy system of Federalism. This is particularly urgent because, on the record of Executive Order 13083, neither the White House staff appears to strongly care about it nor do they appear to have received signals to do so from the President.

The importance of today's hearing is difficult to understate. Dealing as it does with the issue described by Woodrow Wilson as "the cardinal question of our constitutional system," I hope that this Committee will ensure that the system is moved back to its intended future.